

BEFORE THE ENVIRONMENTAL PROTECTION AGENCY

**COMMENTS OF THE WASHINGTON LEGAL FOUNDATION
ON THE ENVIRONMENTAL PROTECTION AGENCY'S
DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI
ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS**

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COMMENTS OF THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF) hereby submits these comments to express its opposition to the Environmental Protection Agency's (EPA) Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, published at 65 Fed. Reg. 39,650 (June 27, 2000). WLF believes that the draft guidance is legally flawed, procedurally improper, unwise and unworkable as a matter of policy, and that the guidance should be withdrawn. At a minimum, it behooves the agency to hold additional public hearings on the draft guidance; the hearings held earlier this summer shortly after the draft was published did not give the public ample time to analyze the guidance and provide meaningful comments.

I. INTERESTS OF WLF

WLF is a non-profit public interest law and policy center with supporters nationwide. WLF regularly appears before federal and state courts and regulatory agencies to promote economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before federal and state courts in numerous cases involving excessive and unlawful government regulation, particularly environmental regulation.

More pertinently, WLF was the only organization to file a brief with the U.S. Supreme Court urging it to grant review of the environmental justice case, *Seif v. Chester Residents Concerned For Quality Living*, No. 97-1620, *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998). WLF also filed briefs supporting the petitions in *Powell v. Ridge*, 187 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999), and in *Alexander v. Sandoval*, No. 99-1908, (*cert. pending*). In the *Seif*, *Powell*, and *Sandoval* cases, WLF argued that the "disparate impact" theory of discrimination was invalid inasmuch as Title VI only forbids intentional discrimination.

WLF also submitted formal comments to the EPA on May 6, 1998, opposing EPA's earlier version of this guidance, *i.e.*, EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits. In addition, WLF representatives have attended meetings and/or monitored the work of at least three different advisory committees that EPA had established to advise it on what EPA's Environmental Justice policy should be. WLF also filed motions with the EPA on October 28, 1998, to intervene in all the pending Title VI complaints, urging the EPA to dismiss the complaints for legal and policy reasons.¹

WLF's Legal Studies Division has also published numerous educational materials and has sponsored public briefings on the subject of Environmental Justice. See, e.g., Gerald H. Yamada, *Unanswered Questions in EPA's Environmental Justice "Guidance"* (WLF LEGAL OPINION LETTER April 3, 1998); Gregg T. Schultz, *Activist Agencies Lack Authority To Impose Environmental Justice* (WLF LEGAL BACKGROUNDER Dec. 5, 1997); WLF Environmental Justice Briefing, Dec. 16, 1997 (featuring Robert Knox, EPA's Office of Environmental Justice, and attorneys David Graham and Julie Domike). WLF sponsored another briefing on Environmental Justice on November 11, 1998, featuring James Seif, Secretary of Pennsylvania's Department of Environmental Protection, Harry C. Alford, President of the National Black Chamber of Commerce, and Rafael DeLeon, EPA's then-Acting Associate General Counsel, Office of Civil

¹ Shortly thereafter, the EPA, to its credit, dismissed one of the Title VI complaints against Select Steel Company in Michigan, finding that there was no valid Title VI claim because there were no adverse effects from any pollution, regardless of the racial composition of the population in the area. See Letter from Ann E. Goode, Director, Office of Civil Rights, to St. Francis Prayer Center and Michigan Dep't of Environmental Quality, EPA File No. 5R-98-R5 (October 30, 1998).

Rights. The briefing was moderated by Dick Thornburgh, former Attorney General of the United States.

II. BACKGROUND

On June 27, 2000, EPA issued its "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (draft guidance or guidance), ostensibly to provide a framework for processing complaints filed under EPA's discriminatory effect regulations. *See* 40 C.F.R. Part 7. EPA's discriminatory effect regulations invoke Title VI of the Civil Rights Act of 1964, which provides, in pertinent part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. EPA's regulations prohibit any covered program receiving federal assistance from using criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin, or sex. 40 C.F.R. § 7.35(b). The draft guidance also cites Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" as authority for its issuance.

The draft guidance proposes a framework for processing Title VI complaints and modifies EPA's Interim Guidance on the same subject issued on February 5, 1998. While the draft guidance is in some respects an improvement over the earlier Interim Guidance, they both suffer from the same fatal flaw by purporting to base Title VI complaints on disparate impacts rather than on intentional discrimination.

III. DISCUSSION

A. The Draft Guidance Is Based Upon Discriminatory Effect Regulations Which Are Legally Invalid

The entire concept of enforcing “environmental justice” under EPA’s Title VI regulations is legally flawed because Title VI prohibits only instances of intentional discrimination, rather than unintentional “disparate impacts” that allegedly affect minority communities.² While WLF recognizes that the EPA and other federal agencies have promulgated regulations prohibiting criteria or methods of administration which produce discriminatory effects, purportedly under the authority of Title VI, WLF submits that EPA is not free to go beyond the clear intent of Congress in enacting Title VI.

As authority for the draft guidance, EPA cites a 1994 memorandum from the Attorney General admonishing agencies to enforce discriminatory effect regulations. *See* Department of Justice, Attorney General’s Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964 (July 14, 1994). This terse and superficial memorandum, in turn, cites the Supreme Court’s decisions in the cases of *Guardians Ass’n v. Civil Serv. Comm’n of the City of New York*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), as alleged authority for issuing disparate impact regulations. While WLF recognizes that numerous federal agencies and some lower federal courts have assumed the validity of discriminatory effect regulations on the basis of those decisions, as will be seen, the

² WLF’s objections to the legal underpinnings of EPA’s disparate impact regulations apply with equal force to EPA’s contemporaneously issued Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs. 65 Fed. Reg. 39650 (June 27, 2000).

Supreme Court did not “hold” in those cases that such regulations are valid. In fact, a recent decision of the Court has cast this proposition into considerable doubt. Moreover, the Supreme Court currently has pending before it a petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, *Alexander v. Sandoval*, No. 99-1908, which may lead to the Court’s review of the validity of these regulations.

Both constitutional and statutory constraints limit EPA’s regulatory authority to prohibiting instances of intentional discrimination. The Supreme Court has held that the Fourteenth Amendment to the Constitution prohibits only instances of intentional discrimination, and does not prohibit instances of discriminatory effect. *Washington v. Davis*, 426 U.S. 229 (1976). In turn, the Court has likewise determined that Title VI’s protection extends no further than the Fourteenth Amendment, and thus, Title VI itself does not prohibit instances of discriminatory effect.³ *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Guardians*, 463 U.S. at 608, n.1 (Powell, J., concurring); *Regents of Univ. of California v. Bakke*, 438 U.S. 281,

³ Section 601 of Title VI provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000(d).

Section 602 of Title VI provides, in pertinent part, that:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1.

284-87 (1978). Thus, both the Constitution and Title VI itself, which provided the authority for the EPA regulations at issue, protect only against instances of discriminatory intent.

The Attorney General's memorandum states that the Court's decisions in *Guardians* and *Alexander* held that an agency's discriminatory effect regulation under section 602 is a valid exercise of its authority. However, properly read, neither of these decisions encompass such a broad and erroneous holding.

Guardians involved an allegation that a last hired-first fired policy for lay-offs of police officers had a disproportionate effect on black and Hispanic police officers because officers were hired in order of their examination scores, and the examinations allegedly discriminated against minorities. *Guardians*, 463 U.S. at 584-85. The plaintiffs alleged that the policy violated Titles VI and VII of the Civil Rights Act, as well as the Fourteenth Amendment and other laws. *Id.* at 586. As to the claim for relief under Title VI, the Second Circuit had denied relief on the grounds that proof of discriminatory intent was required. *Id.* at 588. The Supreme Court rendered a deeply divided decision which affirmed the Second Circuit's denial of relief under Title VI.

Guardians should not be misread as "holding" that discriminatory effect regulations are valid exercises of an agency's authority. To the contrary, a plurality of four justices in *Guardians* stated that discriminatory effect regulations were *not* a valid exercise of agency power. *Id.* at 611, n.5 (Powell, J., concurring in judgment); *id.* at 612 (Rehnquist, J., concurring in judgment and joining in Part II of Justice Powell's opinion); *id.* at 614-15 (O'Connor, J., concurring in judgment). Three justices stated that discriminatory effect regulations were valid even though Title VI itself required discriminatory intent. *Id.* at 644-45 (Stevens, J., dissenting). Justice Marshall stated that a discriminatory effect standard was permissible under either Title VI or the

agency regulations. *Id.* at 623-24 (Marshall, J., dissenting). Justice White stated that only noncompensatory, prospective relief was available under either Title VI or its regulations, and thus that the Second Circuit's denial of compensatory relief should be affirmed. *Id.* at 592-94. Justice White proceeded in *dictum* to state that a discriminatory effect standard was permissible under Title VI, but that *dictum* played no part in the Court's holding. *Id.* Properly read, the holding of *Guardians* is that there is no cause of action for compensatory damages for allegations of discriminatory effect under either Title VI or agency Title VI regulations, and any suggestion of a broader holding is simply incorrect.

Because five Justices in *Guardians* (the four dissenters plus Justice White) stated that the Title VI disparate impact regulations were valid, some courts and observers might conclude that *Guardians* "held" that those regulations were valid. But as the Supreme Court emphasized once again just this past term, "This is simply not the way that reasoned constitutional adjudication proceeds." *United States v. Morrison*, 120 S. Ct. 1740, 1757 (2000). One cannot glean the Court's "holding" in a case by adding together the views of concurring and dissenting Justices, even when the sum is five or greater. Rather, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quoting from *Marks v. United States*, 430 U.S. 188, 193 (1977)). Thus, in *Morrison* the Court rejected the argument that a view joined in by three concurring Justices and three dissenting Justices constituted a "holding" of the Court in *United States v. Guest*, 383 U.S. 745 (1966). *Morrison*, 120 S. Ct. at 1757.

The Attorney General memorandum also cites the Court's decision in *Alexander*, but, again, *Alexander* likewise contains no such holding, nor could it alter the limited holding of *Guardians* after the fact. *Alexander* did not involve Title VI, but rather the Rehabilitation Act. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a state's reduction in the number of inpatient hospital days that the state's Medicaid program would pay on behalf of the recipients. *Alexander*, 469 U.S. at 289. The plaintiffs alleged that the state's reduction had a discriminatory effect on the handicapped and violated section 504 of the federal Rehabilitation Act and its implementing regulations.

The unanimous and limited holding of the Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Attorney General's memorandum read *Alexander* far more broadly, apparently based upon the following passage from the Court's opinion, which stated:

In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964 . . . which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *In essence*, then, we held that Title VI had delegated to the agencies *in the first instance* the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 292-94 (emphasis added) (citation omitted).

Of course, as is made clear by the previous discussion of *Guardians*, that case did not “hold” that a disparate impact claim could be pursued through agency regulations under Title VI, and any discussion of that subject in *Guardians* was *dicta*. Moreover, this after-the-fact explanation of *Guardians* in *Alexander* was *dicta* twice over, as *Alexander* did not even involve a Title VI claim and the discussion was irrelevant to the result in that case. Indeed, the *Alexander* Court reversed the lower court’s ruling that the plaintiffs had established a prima facie violation of section 504.

Thus, it is error to read the Court’s decisions in *Guardians* and *Alexander* as a holding on the validity of agency discriminatory effect regulations. Further, since the time those decisions were rendered, the Court has not held that such regulations are valid. To the contrary, the Court’s more recent statement in *Fordice* raises the question which the Court may address in the *Sandoval* case, specifically, whether such discriminatory effect regulations are valid to the extent they purport to reach conduct not proscribed by Title VI and the Fourteenth Amendment.

In *Fordice*, the Court addressed the correct legal standard for evaluating a state’s compliance with the Equal Protection Clause in the context of school desegregation. In particular, the Court considered the standard to be applied to determine if a state had eradicated policies and practices traceable to a history of *de jure* segregation in a public university system. *Fordice*, 505 U.S. at 723-24, 727-28.

In its opinion, the Court made the following statement with regard to the private plaintiffs’ Title VI claim:

Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to “take affirmative action to overcome the effects of prior discrimination.” *Our cases*

make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues in these cases as they are implicated under the Constitution.

Id. at 732, n.7 (emphasis added) (citations omitted).

As the Third Circuit recognized in *Chester Residents*, “[h]idden within the Court’s statement may be an indication that implementing regulations, such as the EPA’s, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment.” *Chester Residents*, 132 F.3d at 931 n. 9. However, the court dodged the statement’s implications, which are assuredly not hidden, by stating, “we do not believe that the Court would overturn *Guardians* and *Alexander* in such an oblique manner.” *Id.* Of course, as is clear from the previous discussion, there was no such holding in *Guardians* and *Alexander* which needed overturning. The Third Circuit simply misread the breadth of the Supreme Court’s decisions in *Guardians* and *Alexander*, and failed to heed an obvious warning sign from the Court in *Fordice*.

Just as the Court has held that Title VI extends no further than the Fourteenth Amendment, similarly, an agency regulation can extend no further. An administrative agency should not be free to proscribe otherwise lawful conduct through a regulation simply because it can be said that the regulation arguably furthers one of the purposes of an enabling statute. Such policy judgments are for the Congress to decide, and when the Congress decides that a purpose of the statute will be accomplished by proscribing certain conduct, a federal agency is not free to upset the congressional compromise by proscribing even more conduct in the name of furthering one of the statute’s purposes. Given that § 601 does *not* incorporate a disparate impact standard, it is difficult to discern how regulations incorporating such a standard could be said to

“effectuate” the provisions of § 601. As Justice O’Connor stated in her concurring opinion in *Guardians*:

Such regulations do not simply “further” the purpose of Title VII; they go well *beyond* that purpose. . . . An administrative agency is itself a creature of statute. Although the Court has stated that an agency’s legislative regulations will be upheld if they are “reasonably related” to the purposes of the enabling statute . . . we would expand considerably the discretion and power of agencies were we to interpret “reasonably related” to permit agencies to proscribe conduct that Congress did not intend to prohibit. “Reasonably related to” simply cannot mean “inconsistent with.”

Guardians, 463 U.S. at 614-15 (O’Connor, J., concurring).

Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and discriminatory effect represents precisely the type of broad public policy decision which rests in the hands of our elected legislatures, and not administrative agencies.

Moreover, the President’s Executive Order 12,898 provides no legal basis for the draft guidance. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994). While the draft guidance identifies the executive order as the authority for the proposed process for assessing Title VI complaints, the guidance concedes that Title VI is inapplicable to EPA actions. Further, an executive order cannot contravene existing statutory law, nor can it be issued without constitutional or statutory authority. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

Thus, the Executive Order cannot overcome the statutory and constitutional deficiencies outlined above.

The EPA should not compound an erroneous expansion of regulatory power by embarking on a far-reaching application of Title VI without congressional authorization. Congress has not authorized the EPA to attempt to regulate all manner of allegedly discriminatory effects caused by environmental permitting.

B. The Draft Guidance Embodies A Flawed View of Legal Causation

Even assuming *arguendo* that the EPA has the authority under Title VI to prohibit methods or criteria which cause discriminatory effects, EPA's view of environmental justice as embodied by the draft guidance is flawed because EPA cannot show that environmental permitting causes the discriminatory effects in question. Causation is undeniably a basic tenet of a discriminatory effects or disparate impact claim. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (racial imbalance amounts to constitutional violation only if it results from state action and *not* other factors, such as residential housing patterns); *Elston v. Talledaga Co. Bd. of Educ.*, 997 F.2d 1394, 1407, 1415 (11th Cir. 1993) (plaintiff had burden to show that School Board's siting of school caused allegedly disparate impact).

Thus, a plaintiff pursuing an environmental justice claim under Title VI must do more than simply show a statistical demographic disparity according to race. Moreover, a permitting agency or permittee is not required under Title VI to affirmatively prevent or counteract disparate impacts which it did not cause.

EPA has not demonstrated that environmental permitting as such *causes* an inequitable distribution of facilities, or that it even influences their distribution at all. Where some racial

disparity is shown, a host of factors may be present which have caused that disparity, including housing patterns, economic factors, local land use decisions unrelated to environmental permitting, and the like. The EPA certainly cannot assume that criteria or methods of administration used for environmental permitting caused such disparities. Nor can EPA legally hold permitting agencies and permittees responsible for redressing disparities caused by other factors.

Indeed, it is difficult to believe that EPA or any complainants have any evidence that facilities have been distributed differently since environmental permitting was instituted, as opposed to the distribution of facilities *before* environmental permitting. One may also ask whether minority and low-income groups would suffer more negative environmental consequences in the absence of a scheme of environmental permitting.

EPA's description of what is required in a Title VI complaint does not appear to even require a complainant to plead causation, when that should be a core element of a *prima facie* case of disparate impact discrimination. Further, EPA's framework for conducting the disparate impact analysis does not appear to address this critical issue. Because of the likelihood that the alleged disparity resulted from factors other than environmental permitting, any complainant should be required to allege causation with particularity, and EPA should require complainants to demonstrate causation before there is any attempt to require permitting agencies and permittees to mitigate or justify their criteria or methods.

C. The Guidance Should Require Complainants to Exhaust Administrative Remedies Before Filing A Title VI Complaint.

Even if the EPA determines that Title VI permits the promulgation of disparate impact regulations, WLF submits that it should require complainants to exhaust their administrative remedies with the state permitting agencies before filing a Title VI complaint with the EPA. While it is true that some lower courts have held that Title VI does implicitly provide for a private right of action, that does not mean that agencies are precluded from requiring complainants to exhaust available administrative remedies before filing a Title VI complaint with the agency.

IV. CONCLUSION

For the foregoing reasons, WLF respectfully requests that the EPA consider the above comments and withdraw the draft guidance.

Respectfully submitted,

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